

NO. 47887-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MARVIAN CHRISTOPHER MARTIN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando and Brian Tollefson

No. 14-1-01948-5

BRIEF OF RESPONDENT

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Table of Contents

A.	<u>ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.</u>	1
1.	Did the trial court properly deny defendant's motion to suppress because the officer had a sufficient, reasonable suspicion in order to justify a stop of defendant?	1
B.	<u>STATEMENT OF THE CASE.</u>	1
1.	Procedure	1
2.	Facts	2
C.	<u>ARGUMENT.</u>	5
1.	THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS BECAUSE OFFICER SALES HAD A REASONABLE SUSPICION SUFFICIENT TO JUSTIFY HIS INVESTIGATORY STOP OF DEFENDANT.	5
D.	<u>CONCLUSION.</u>	13

Table of Authorities

State Cases

<i>State v. Afana</i> , 169 Wn.2d 169, 176, 233 P.3d 879 (2010)	5, 6
<i>State v. Armenta</i> 134 Wn.2d 1, 10, 948 P.2d 1280 (2004)	7
<i>State v. Bliss</i> , 153 Wn. App. 197, 203-04, 222 P.3d 107 (2009)	6
<i>State v. Campbell</i> , 31 Wn. App. 833, 835, 644 P.2d 1219 (1982).....	9
<i>State v. Cardenas-Muratalla</i> , 179 Wn. App. 307, 319 P.3d 811 (2014)	8, 9
<i>State v. Gaddy</i> , 152 Wn.2d 64, 77, 93 P.3d 872 (2004).....	9
<i>State v. Garvin</i> , 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).....	5
<i>State v. Gibson</i> , 152 Wn. App. 945, 951, 219 P.3d 964 (2009).....	5, 6
<i>State v. Guzman-Cuellar</i> , 47 Wn. App. 326, 734 P.2d 966 (1987).....	10
<i>State v. Harvey</i> , 41 Wn. App. 870, 707 P.2d 146 (1985).....	7
<i>State v. Hill</i> , 123 Wn.2d 641, 644, 870 P.2d 313 (1994).....	5
<i>State v. Hopkins</i> , 128 Wn. App. 855, 862, 117 P.3d 377 (2005).....	8
<i>State v. Ibarra</i> , 61 Wn. App. 695, 699, 812 P.2d 114 (1991).....	9
<i>State v. Kennedy</i> , 107 Wn.2d 1, 6, 728 P.2d 445 (1986)	8, 10, 12
<i>State v. Lee</i> , 147 Wn. App. 912, 916, 199 P.3d 445 (2008).....	5, 8, 9, 11
<i>State v. Lesnick</i> , 84 Wn.2d 944, 944-45, 530 P.2d 243 (1975)	9
<i>State v. Little</i> , 116 Wn.2d 488, 495, 806 P.2d 749 (1991).....	7
<i>State v. Louthan</i> , 158 Wn. App. 732, 740, 242 P.3d 954 (2010)	5
<i>State v. Marcum</i> , 149 Wn. App. 894, 903, 205 P.3d 969 (2009)	8

<i>State v. Mercer</i> , 45 Wn. App. 769, 727 P.2d 676 (1986).....	10
<i>State v. Patton</i> , 167 Wn.2d 379, 386, 219 P.3d 651 (2009).....	6
<i>State v. Reid</i> , 98 Wn. App. 152, 156, 988 P.2d 1038 (1999).....	5
<i>State v. Rowe</i> , 63 Wn. App. 750, 753, 822 P.2d 290 (1991).....	9
<i>State v. Samsel</i> , 39 Wn. App. 564, 570, 694 P.2d 670 (1985).....	10
<i>State v. Sieler</i> , 95 Wn.2d 43, 47, 621 P.2d 1272 (1980).....	8, 9, 10
<i>State v. Snapp</i> , 174 Wn.2d 177, 197, 275 P.3d 289 (2012).....	6, 9
<i>State v. Thornton</i> , 41 Wn. App. 506, 705 P.2d 271 (1985).....	7
<i>State v. Wakeley</i> , 29 Wn. App. 238, 241, 628 P.2d 835 (1981).....	9
<i>State v. White</i> , 97 Wn.2d 92, 105, 640 P.2d 1061 (1982).....	7

Federal and Other Jurisdictions

<i>Aguilar v. Texas</i> , 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).....	8
<i>Brown v. Texas</i> , 443 U. S. 47, 99 S. Ct 2637, 61 L. Ed. 2d 357 (1979).....	7
<i>Illinois v. Gates</i> , 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).....	8
<i>Navarette v. California</i> , 134 S. Ct. 1683, 1689, 188 L. Ed 2d 680 188 (2014).....	11
<i>Spinelli v. United States</i> , 393 U.S. 410, 89 S. Ct. 584 (1969).....	8
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....	6, 7, 8, 9
<i>U.S. v. Brigoni-Ponce</i> , 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1974).....	10
<i>United States v. Cortez</i> , 449 U.S. 411, 66 L. Ed. 2d 21, 629 S. Ct. 690 (1981).....	10

Constitutional Provisions

Article I, section 7, Washington State Constitution6

Fourth Amendment, United States Constitution.....6

Rules and Regulations

CrR 3.6.....1, 2

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly deny defendant's motion to suppress because the officer had a sufficient, reasonable suspicion in order to justify a stop of defendant?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Marvian Christopher Martin ("defendant") with domestic violence court order violation. CP 1-2. The State also alleged that defendant had two prior convictions for violating no contact orders and that this was a domestic violence incident. CP 1-2.

Defendant filed a 3.6 Motion to suppress evidence. CP 5-19. The trial court denied defendant's motion. 05-27-15 RP 40-44.

On July 13, 2015, this case proceeded to a jury trial. 07-13-15 RP

1. The jury found defendant guilty of felony violation of a court order. CP 82. The jury also determined that defendant and the victim were members of the same family or household. CP 83.

Defendant was sentenced under the drug offender alternative sentence to 30 months in custody and 30 months of community custody. CP 96-111. Defendant timely appealed. CP 112.

2. Facts

Puyallup Tribal Police Officer Ryan Sales was at a gas station to observe some bail bondsmen take a person into custody. 5-27-15 RP 6.¹ As he exited his vehicle, he heard some commotion going on to the right of his vehicle in the general area by the gas pumps. 5-27-15 RP 6. He was concentrating on watching the bail bondsmen move in to take custody of the person so he was more concerned with that, but remembered hearing some yelling. 5-27-15 RP 7.

An unidentified male came up to Officer Sales and stated there were was an incident going on between a male and a female at the pumps. 5-27-15 RP 8. This male said that he saw the man hitting the woman. 5-27-15 RP 8. Officers Sales looked, but because of the angle, the area was blocked by the gas pumps. 5-27-15 RP 8.

A black Mercedes started to pull away and the man said that it was the vehicle where the assault was occurring. 5-27-15 RP 9. Because the car was pulling away, Officer Sales did not have time to get the man's information as he believed there was an assault going on in the vehicle and it was departing. 5-27-15 RP 9.

Officer Sales could hear yelling coming from the vehicle and could see through the vehicle's open window that the driver was animated and moving his hands around. 5-27-15 RP 9-10. He heard loud cursing. 5-

¹ As defendant is only alleging error with the trial court's failure to grant his 3.6 suppression motion, these facts are taken from the 3.6 hearing.

27-15 RP 21. He pursued the vehicle and initiated a traffic stop with his lights and sirens. 5-27-15 RP 10.

Defendant immediately exited the vehicle and said, "Why are you stopping me?" 5-27-15 RP 11. The female had also jumped out of the car and was walking away. 5-27-15 RP 11-12. Officer Sales thought it was odd that she was trying to leave. 5-27-15 RP 12. Defendant was standing there waving his hands around and talking loudly. 5-27-15 RP 12. Defendant was being very aggressive so Officer Sales called for backup. 5-27-15 RP 12.

As Officer Sales waited for backup, defendant started to walk away heading westbound. 5-27-15 RP 12. The woman was standing in another location and she looked afraid. 5-27-15 RP 12. Officer Sales was concerned defendant was going to flee so he instructed defendant that he was not allowed to leave and pulled his pepper spray. 5-27-15 RP 12-13.

Officer Sales eventually got defendant to sit on the curb and calm down. 5-27-15 RP 13. Officer Sales asked defendant for his driver's license, but defendant did not have one. 5-27-15 RP 13. Officer Sales identified the passenger as Jennilee Gonzales. 5-27-15 RP 15. During a record check on defendant, Officer Sales noted that defendant had an open DOC escape warrant and that Gonzales is the protected person on a protection order where defendant is the respondent. 5-27-15 RP 16-17. Defendant was placed under arrest. 5-27-15 RP 17.

Based on the above information, the trial court entered findings of fact and conclusions of law. CP 37-42.

Finding of Fact II says:

Officer Sales received unsolicited information from a citizen. An unidentified male approached Officer Sales while he was at the gas station and advised he saw a male arguing with a female in a Mercedes Benz and the male hit the female. The citizen pointed out the Mercedes Benz to the officer. The Mercedes Benz was driving away from the pumps. Officer Sales saw a male driver, later identified as defendant, waving his arms violently and heard yelling from inside the car. Officer Sales got in his patrol car and followed the vehicle. The car was leaving the gas station and Officer Sales had to act quickly, he did not have time to get any information from the male before leaving to pursue the vehicle.

CP 38.

Finding of Fact IV says:

The information provided by the citizen was corroborated by Officer Sales [sic] own observations. This formed a reasonable, articulable suspicion that allowed the officer to perform a *Terry* stop. The assault had occurred in the presence of the citizen and in the proximity of the officer. The officer heard yelling from the same car and saw defendant waving his arms which corroborated the citizen's information. The officer almost immediately after speaking with the citizen got in his car to pursue the vehicle pointed out to him by the citizen.

CP 38.

Conclusion of Law I says:

The Terry stop of defendant was justified as Officer Sales had a reasonable, articulable, suspicion that the defendant had committed an assault based on what he was told by the

male citizen combined with what he personally heard and observed. The stop was not pretextual.

CP 40-41.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT’S MOTION TO SUPPRESS BECAUSE OFFICER SALES HAD A REASONABLE SUSPICION SUFFICIENT TO JUSTIFY HIS INVESTIGATORY STOP OF DEFENDANT.

“When reviewing the denial of a suppression motion, an appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law.” *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009) (citing *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)). “Evidence is substantial when it is enough ‘to persuade a fair-minded person of the truth of the stated premise.’” *Id.* (quoting *State v. Reid*, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). The appellate court does not review credibility determinations on appeal, leaving them to the fact finder. *State v. Gibson*, 152 Wn. App. 945, 951, 219 P.3d 964 (2009). Unchallenged findings of fact are treated as verities on appeal. *State v. Afana*, 169 Wn.2d 169, 176, 233 P.3d 879 (2010). Appellate courts “review conclusions of law from an order pertaining to the suppression of evidence de novo,” *Id.*, *State v. Louthan*, 158 Wn. App. 732, 740, 242 P.3d 954 (2010), *State v. Lee*, 147 Wn. App. 912, 916, 199 P.3d 445 (2008), and

“can uphold the trial court on any valid basis.” *Gibson*, 152 Wn. App. at 948, 958.

The Fourth Amendment to the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause.” Article I, section 7 of the Washington State Constitution mandates that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

“[A] warrantless search [or seizure] is per se unreasonable, unless it falls within one of the carefully drawn exceptions to the warrant requirement.” *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). Similarly, “[t]he ‘authority of law’ requirement of article I, section 7 is satisfied by a valid warrant, subject to a few jealously guarded exceptions.” *State v. Afana*, 169 Wn.2d 169, 176-77, 233 P.3d 879 (2010).

“One such exception is that an officer may briefly detain a vehicle’s driver for investigation if the circumstances satisfy the ‘reasonable suspicion’ standard under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).” *State v. Bliss*, 153 Wn. App. 197, 203-04, 222 P.3d 107 (2009); *State v. Snapp*, 174 Wn.2d 177, 197, 275 P.3d 289 (2012). Probable cause for the stop of a person or car exists when there is a reasonable suspicion that criminal activity is afoot. *Terry v.*

Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Specifically, an investigatory stop is lawful if the officer possesses “specific articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Id.* at 21. A seizure is reasonable and lawful when it is based on an officer’s objectively reasonable suspicion that an individual has engaged in criminal activity. *State v. Armenta* 134 Wn.2d 1, 10, 948 P.2d 1280 (2004).

The police are authorized to detain suspects a brief time for questioning when there is an articulable suspicion, based on objective facts, that the suspect is involved in some type of criminal activity. *Brown v. Texas*, 443 U. S. 47, 99 S. Ct 2637, 61 L. Ed. 2d 357 (1979). Washington law gives officers the legal right to stop a suspected person, request the person produce identification and an explanation of his or her activities as long as the officer’s “well-founded suspicion” meets the *Terry* rational. *State v. Little*, 116 Wn.2d 488, 495, 806 P.2d 749 (1991), quoting *State v. White*, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982).

A police officer’s decision to briefly detain an individual may be based on his or her own observations, other officers’ observations, tips from citizens and informants, or any combination of these. *State v. Thornton*, 41 Wn. App. 506, 705 P.2d 271 (1985); *State v. Harvey*, 41 Wn. App. 870, 707 P.2d 146 (1985). “An informant’s tip alone may provide the necessary reasonable suspicion to justify an investigatory

stop.” *State v. Cardenas-Muratalla*, 179 Wn. App. 307, 319 P.3d 811 (2014). See *State v. Lee*, 147 Wn. App. 912, 918, 199 P.3d 445 (2008); *State v. Kennedy*, 107 Wn.2d at 7-8, *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980); *State v. Hopkins*, 128 Wn. App. 855, 862, 117 P.3d 377 (2005).

“[T]he legal standard for determining whether police suspicion resulting from an informant’s tip is sufficiently reasonable to support a *Terry* stop is the ‘totality of the circumstances’ test announced in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), not the two-part reliability inquiry derived from *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584 (1969).” *State v. Marcum*, 149 Wn. App. 894, 903, 205 P.3d 969 (2009); *State v. Lee*, 147 Wn. App. 912, 916-17, 199 P.3d 445 (2008) (citing *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 527 (1983)).

An informant’s tip provides police with the reasonable suspicion necessary to justify a *Terry* stop if it possesses sufficient indicia of reliability. *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1992). An uncorroborated tip from a 911 caller in automobile stop cases possesses sufficient “indicia of reliability” where “(1) the source of the information is reliable and (2) the report contains enough objective facts to justify the pursuit and detention of the suspect.” *State v. Campbell*, 31 Wn. App.

833, 835, 644 P.2d 1219 (1982) (*citing State v. Wakeley*, 29 Wn. App. 238, 241, 628 P.2d 835 (1981)).

With regard to prong one in *Campbell*, the State must establish “(1) the basis of the informant’s information, and (2) the credibility of the informant or the reliability of the informant’s information.” *State v. Gaddy*, 152 Wn.2d 64, 77, 93 P.3d 872 (2004). The burden of demonstrating an identified citizen’s credibility is relaxed. *State v. Ibarra*, 61 Wn. App. 695, 699, 812 P.2d 114 (1991). “Citizen informants are deemed presumably reliable.” *Gaddy*, 152, Wn.2d at 73. The seriousness of the criminal activity reported by an informant can affect the reasonableness calculus which determines whether an investigatory detention is permissible. *Sieler*, 95 Wn.2d at 50 (*citing State v. Lesnick*, 84 Wn.2d 944, 944-45, 530 P.2d 243 (1975)). *State v. Cardenas-Murtalla*, 179 Wn. App. 307, 313, 319 P.3d 811 (2014).

In reviewing the propriety of a *Terry* stop a court should evaluate the totality of the circumstances known to the officer at the time of the inception of the stop. *State v. Snapp*, 174 Wn.2d 177, 197, 275 P.3d 289 (2012); *State v. Lee*, 147 Wn. App. 912, 917, 199 P.3d 445 (2008) *quoting State v. Rowe*, 63 Wn. App. 750, 753, 822 P.2d 290 (1991). In evaluating an investigatory stop, a court should take into consideration an officer’s experience. An officer’s suspicion of criminal activity, based on his or her experience in interpreting what would, to the ordinary citizen, appear to be

innocent conduct, may appear incriminating to the officer in light of past experience. *U.S. v. Brigoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1974); *State v. Samsel*, 39 Wn. App. 564, 570, 694 P.2d 670 (1985); see also *United States v. Cortez*, 449 U.S. 411, 66 L. Ed. 2d 21, 629 S. Ct. 690 (1981).

While an officer must have articulable reasons for investigating, he need not be able to indicate the specific crime being investigated in order for a stop to be legitimate. *State v. Mercer*, 45 Wn. App. 769, 775, 727 P.2d 676 (1986). “The seriousness of the criminal activity” suspected “can affect the reasonableness calculus which determines whether an investigatory detention is permissible.” *State v. Sieler*, 95 Wn.2d 43, 50, 621 P.2d 1272 (1980). “Crime prevention and crime detection are legitimate purposes for investigative stops or detention...[c]ourts have not required the crime suspected or under investigation to be a felony or serious offense.” *State v. Kennedy*, 107 Wn.2d 1, 6, 728 P.2d 445 (1986). The scope of the detention may be prolonged on the basis of information obtained during the detention. *State v. Guzman-Cuellar*, 47 Wn. App. 326, 734 P.2d 966 (1987). Finally, it is only necessary that the circumstances at the time of the stop be more consistent with criminal activity than innocent conduct. *State v. Mercer*, 45 Wn. App. 769, 727 P.2d 676 (1986).

Defendant only assigns error to Finding of Fact IV, arguing that the trial court erred in finding that the information provided by the citizen

informant was corroborated by Officer Sales' own observations and that Officer Sales had a reasonable, articulable suspicion that allowed him to perform a Terry stop. BOA, page 1. Defendant's argument fails because substantial evidence supports Finding of Fact IV.

In the present case, Officer Sales had reasonable, articulable suspicion that a crime had occurred, and in fact was possibly still occurring. This information was based on the citizen informant's report and also on Officer Sales' own observations.

To begin with, the informant's information was reliable. The basis of the informant's information was based on direct observation and was relayed to Officer Sales as the incident was taking place. It can be deemed reliable because it was contemporaneous with the events. *See, e.g., Navarette v. California*, 134 S. Ct. 1683, 1689, 188 L. Ed 2d 680 188 (2014) ("contemporaneous report has long been treated as especially reliable."). This is akin to a present sense impression. The informant says that he just saw defendant hit a woman in the car during this incident is occurring at the gas pumps. 5-27-15 RP 8. This man was telling Officer Sales about a crime happening nearby while the crime was occurring.

Additionally, when the informant is an eyewitness to the events he described, as this informant was, his information is more reliable. "A citizen-witness's credibility is enhanced when he or she purports to be an eyewitness to the events described." *State v. Lee*, 147 Wn. App. 912, 918, 199 P.3d 445 (2008). Here, the informant sees defendant assault a woman

and immediately tells Officer Sales what he is saw. This is direct, first-hand information provided to Officer Sales.

Officer Sales then supplements the informant's observations with his own observations. Officer Sales remembers that he heard yelling from the direction of the pumps when he first arrived at the gas station (5-27-15 RP 6) and also after the informant contacts him (5-27-15 RP 9-10). Officer Sales then sees the Mercedes pull away from the gas station and can see that defendant is animated and moving his hands around. 5-27-15 RP 9-10. He also hears loud cursing. 5-27-15 RP 21.

It is important to note that police do not have to know beyond a reasonable doubt or even have probable cause that a crime occurred to justify an investigatory stop. **Kennedy**, 107 Wn.2d at 5-6. All that is required is a *substantial possibility* that criminal conduct has occurred or is about to occur. *Id.* at 6(emphasis added). Indeed, a determination that reasonable suspicion exists need not rule out the possibility of innocent conduct. *Id.* While defendant characterizes this incident as “couple having a verbal argument” (BOA, page 12), Officer Sales’ stop was reasonable to ascertain whether this was only a verbal argument as defendant claims or whether it was an assault as the informant had observed.

Under **Kennedy**, based on the totality of the circumstances, this was a lawful detention. Not only was there a reliable informant's observations that an assault had taken place, but Officer Sales was able to

corroborate the informant's observations. Officer Sales was concerned that there was an assault and that the assault may be continuing based on his observations. 5-27-15 RP 9. Officer Sales therefore initiated a traffic stop to investigate make sure that the assault was not continuing. Based on the totality of these circumstances and the inferences drawn from them, Officer Sales had a reasonable suspicion sufficient to justify his initial stop.

After the initial stop to investigate, Officer Sales then contacted defendant, who is agitated and unable to produce a driver's license. 5-27-15 RP 11-13. Officer Sales then does a record check on defendant, and learns that defendant had an open DOC escape warrant and that Gonzales is the protected person on a protection order where defendant is the respondent. 5-27-15 RP 16-17. This further investigation is what leads to defendant's arrest and ultimate conviction of the charge in this case.

Officer Sales had a reasonable, articulate suspicion sufficient to justify his investigatory stop. This suspicion was justified based on the informant's report and his own observations, especially in light of the fact that he believed the assault was continuing.

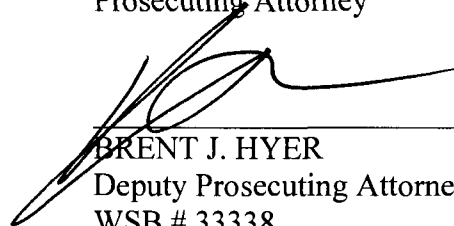
D. CONCLUSION.

The trial court properly denied Respondent's motion to suppress because Officer Sales had a reasonable suspicion sufficient to justify his investigatory stop. Substantial evidence supports the trial court's findings

of fact and conclusions of law. The Court should affirm defendant's conviction for felony violation of a protection order.

DATED: February 3, 2016.

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Certificate of Service:

The undersigned certifies that on this day she delivered by *efile* ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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PIERCE COUNTY PROSECUTOR

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